

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Assessment and Collection
of Regulatory Fees for
Fiscal Year 1997

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MD Docket No. 96-186

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COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

I.	SUMMARY	2
II.	THE FEE INCREASES PROPOSED FOR THE CMRS MOBILE SERVICES AND CMRS ONE-WAY PAGING CATEGORIES ARE EXCESSIVE, UNWARRANTED, AND NOT JUSTIFIED BY THE <i>NOTICE</i>	4
	A. The <i>Notice</i> Is Deficient in Providing Necessary Information Concerning the Determination of the Proposed Regulatory Fee Increases for Fiscal Year 1997	4
	B. The <i>Notice</i> Proposes Dramatic Price Increases for Services That Are Substantially Deregulated Pursuant to Congressional and Commission Order	9
	C. The Commission Lacks Accountability to Those Entities Responsible for Funding Its Regulatory Activities	10
III.	TWO-WAY PAGING SHOULD BE SUBJECT TO THE SAME REGULATORY FEE PAYMENTS AS ONE-WAY PAGING	11
IV.	CONCLUSION	12

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**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA"),¹ by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned docket.² The Commission has not justified the extraordinary increases in the per unit charges to be levied in the CMRS Mobile Services and CMRS One-Way Paging categories or the overall recovery of funds to be obtained from licensees in these services.

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, FCC 97-49 (Mar. 5, 1997) (Notice of Proposed Rulemaking) ("*Notice*"), *Erratum*, Mimeo No. 72735 (Mar. 7, 1997). The *Notice* was published in the Federal Register on March 10, 1997, 62 Fed. Reg. 10793. As a result, comments are due on March 25, 1997, and reply comments are due on April 4, 1997.

Consistent with Congressional directives substantially deregulating commercial mobile radio services, the regulatory fees charged in these categories should be dramatically reduced from the levels proposed in the *Notice*. In addition, the Commission should place two-way paging/messaging services in the same category as one-way paging for purposes of calculating 1997 fiscal year regulatory fees.

I. SUMMARY

The Commission has proposed extensive increases in the amounts of the regulatory fees to be collected from CMRS licensees to cover the agency's enforcement, policy and rulemaking, international, and user information activities for fiscal year 1997. The increases are substantial when viewed from the perspective of the CMRS industry overall, from the perspective of individual carriers, and from the perspective of the charges imposed on a per unit basis.

The Commission has not adequately explained the rationale for the increased charges proposed in the *Notice* for the CMRS industry. Initially, Congress adopted legislation in 1993 and 1996 that resulted in substantial deregulation of the industry. The Commission as well has sought to implement rule changes and policies to reduce the regulatory burdens imposed on the industry. Despite this, however, the fees imposed on the CMRS industry to fund the Commission's regulatory activities have continued to grow.

The Commission has failed to provide any justification for the amounts to be funded by the CMRS industry. The new cost accounting system is not explained in any detail sufficient to permit interested parties to evaluate the decisions made by the Commission in structuring the assignment of costs. Despite increasing numbers of licensees and subscriber units, the fees

to be collected from individual licensees keep increasing, and the per unit rate likewise continues to grow. There is no basis for interested entities to assess whether the regulatory fees being collected by the Commission -- at the direction of Congress -- bear any relationship to the amount of regulatory work being done, as required by statute. Overall, there is no accountability whatsoever to the public or to the payors of the fees used to fund Commission activities. Without greater accountability for its past activities and its current proposals, the Commission must restart its efforts to calculate the fee amounts to be collected from CMRS operators.

Finally, PCIA urges the Commission to act favorably on the proposal to create a CMRS Messaging Service fee category that would combine both one-way and two-way paging.³ The operational and technical characteristics -- factors considered relevant by the Commission in placing private microwave and commercial microwave operations in the same category -- of two-way paging more closely resemble those of one-way paging than those of two-way broadband or voice communications. Equitable considerations thus warrant charging two-way paging operators the same fee as one-paging licensees.

³ See Notice, ¶ 39.

II. THE FEE INCREASES PROPOSED FOR THE CMRS MOBILE SERVICES AND CMRS ONE-WAY PAGING CATEGORIES ARE EXCESSIVE, UNWARRANTED, AND NOT JUSTIFIED BY THE *NOTICE*

A. The *Notice* Is Deficient in Providing Necessary Information Concerning the Determination of the Proposed Regulatory Fee Increases for Fiscal Year 1997

The *Notice* proposes to collect approximately \$11,040,000 from CMRS Mobile Services payors and \$864,000 from CMRS One-Way Paging payors.⁴ Additional information provided by the Commission in the *Notice* included its estimate of 46,000,000 fiscal year payment units for CMRS Mobile Services and 28,800,000 fiscal year payment units for CMRS One-Way Paging;⁵ a calculation of pro-rated revenue requirements (based on the fiscal year 1996 regulatory fee levels and the estimates of fiscal year 1997 payment units) of \$8,738,068 for CMRS Mobile Services and \$643,622 for CMRS One-Way Paging;⁶ a calculation of actual regulatory costs (including a pro rata share of overhead and indirect expenses) derived from the Commission's new accounting system in fiscal year 1996 of \$12,041,038 for CMRS Mobile Services and \$903,625 for CMRS One-Way Paging;⁷ a calculation of pro-rated costs for fiscal year 1997 (based on the fiscal year 1996 actual regulatory costs multiplied by 1.0597) of \$12,760,129 for CMRS Mobile Services and \$957,590 for CMRS One-Way

⁴ *E.g.*, *Notice*, Attachment E.

⁵ *See id.*, Attachment C.

⁶ *Id.*

⁷ *Id.*, Attachment D.

Paging;⁸ and a pro-rated target revenue of \$10,922,585 for CMRS Mobile Services and \$804,528 for CMRS One-Way Paging.⁹ Based on the Commission's calculations, the *Notice* proposes to increase the regulatory fee for CMRS Mobile Services from \$0.17 per unit in fiscal year 1996 to \$0.24 per unit for fiscal year 1997 (approximately an increase of 41 percent per unit) and for CMRS One-Way Paging from \$0.02 per unit in fiscal year 1996 to \$0.03 per unit in fiscal year 1997 (an increase of 50 percent per unit).¹⁰

Although the figures provided in the *Notice* portraying the Commission's calculations are interesting and useful, the *Notice* omits significant information that is essential for verifying the proposals for increasing the regulatory fee amounts to be collected from regulatees in general and from CMRS Mobile Services and CMRS One-Way Paging licensees in particular. First, the Commission has provided no explanation whatsoever of the mechanics and theory of the cost accounting system that it began to use effective October 1, 1995. Interested parties have *no* information for assessing the factors applied by the Commission in deciding how costs are to be allocated in connection with the enforcement, policy and rulemaking, international, and user information activities performed with regard to the specific categories of fee payors. Thus, PCIA has no ability to determine whether the so-called "actual" costs incurred by the Commission for regulatory activities related to CMRS Mobile Services and CMRS One-Way Paging are valid.

⁸ *Id.*

⁹ *Id.*, Attachment E.

¹⁰ *See id.*, Attachment G.

Likewise, PCIA cannot determine whether application costs -- including the costs of the auctions being held by the Commission for various CMRS services -- are being excluded from the regulatory cost amounts presented in the *Notice*. It appears likely that substantial resources have been and will continue to be devoted to the conduct of auctions. Such activities clearly fall within the Commission's definition of "Authorization of Service,"¹¹ and the Commission has stated that "Authorization of Service" "is *not* one of the activities included as a feeable activity for regulatory fee purposes pursuant to Section 9(a)(1) of the Act."¹² Similarly, the Commission has indicated that it hired a number of staff members (many on a temporary basis) to assist in processing the backlog of contested applications pending before the Wireless Telecommunications Bureau -- which also would fall within "Authorization of Service." As the Commission has recognized, the statutory authority to collect regulatory fees embodied in Section 9(a)(1) of the Communications Act of 1934, as amended,¹³ does not extend to such costs. However, PCIA has no way to determine whether, in terms of the theory underlying the cost accounting system or in its practical application, that statutory directive has been carried out in determining the actual costs allocated to regulatory activities in connection with CMRS Mobile Services or CMRS One-Way Paging.

¹¹ The Commission has defined "Authorization of Service" as "[t]he authorization or licensing of radio stations, telecommunications equipment, and radio operators, as well as the authorization of common carrier and other services and facilities. Includes policy direction, program development, legal services, and executive direction, as well as support services associated with authorization activities." *Notice*, Attachment I.

¹² *Id.*, n.123.

¹³ 47 U.S.C. § 159(a)(1).

Second, the *Notice* fails to disclose additional information necessary to evaluate the proposals for fee increases. For example, the Commission has provided no data on the total number of units for which regulatory fee payments were made for fiscal year 1996, nor compared that number to the estimates of growth in CMRS subscribers and the effect of the conversion of a number of private mobile radio service ("PMRS") operations to CMRS pursuant to the 1993 Budget Act (other than an acknowledgement that such conversion is a factor in the Commission's estimates).¹⁴ Similarly, the Commission has supplied no information about the amount of the regulatory fees collected in fiscal year 1996 in each of the CMRS Mobile Services and CMRS One-Way Paging Services categories. Moreover, the Commission has not made available information that would permit the public or members of the telecommunications industry to determine whether the \$152,523,000 amount designated by Congress to be collected in regulatory fees accurately corresponds to the amount of regulatory activity that in fact will be conducted by the Commission during fiscal year 1997. Access to this type of data is essential if PCIA and other interested members of the telecommunications industry, Congress, and the public are to be able to determine whether the proposals for fiscal year 1997 are consistent with the statutory provisions contained in Section 9(a)(1) as well as in Section 332 and other provisions of the amended Communications Act of 1934.

Third, PCIA notes that the allocation of regulatory fee amounts among the various categories of payors for fiscal year 1997 is based on a pro rata allocation of the costs (adjusted

¹⁴ See *Notice*, Attachment B, n.115.

consistent with the Commission's establishment of a 25 percent revenue ceiling¹⁵) incurred (allegedly) in fiscal year 1996. Yet, given the nature of the Commission's activities in implementing the Telecommunications Act of 1996 as well as in fulfilling its other obligations, there is no reason to believe that the share of regulatory activities imposed by each category of fee payors will be the same in fiscal year 1997 as in fiscal year 1996. The Commission, at the very least, has made no attempt to justify its apparent but unexplained conclusion that the allocations of regulatory activities will remain the same in both of fiscal year 1996 and fiscal year 1997. This apparent failure to take into account the nature of the allocation of regulatory activities among the respective fee categories during fiscal year 1997 (which already was half completed by the time the Commission released the text of the *Notice*) does not meet the requirements of Section 9(b)(1)(B) of the Communications Act of 1934, as amended.¹⁶

Fourth, although the Commission has consistently asserted that its past schedules for the allocation of regulatory fee payments among different categories of payors are based on cost, as derived from methodologies based on the full number equivalent number of employees ("FTEs"), the data provided in Attachment D to the *Notice* suggests that the new cost accounting system has led to a different assignment of costs than would be expected under the prior methodologies. The Commission has not explained this discrepancy in the different methodologies, or, alternatively, has not indicated that the regulatory activities in fiscal year 1996 somehow dramatically shifted from those in prior fiscal years.

¹⁵ *Id.*, ¶¶ 17-18 & Attachment E.

¹⁶ 47 U.S.C. § 159(b)(1)(B).

B. The Notice Proposes Dramatic Price Increases for Services That Are Substantially Deregulated Pursuant to Congressional and Commission Order

As noted previously, the Commission has proposed increases in the amount to be paid per unit of 40 to 50 percent, without adequately explaining that determination. What is particularly troubling, however, is that the Commission's records (at least those made available to the public) appear to suggest an ever-increasing level of regulatory activities in connection with CMRS Mobile Services and CMRS One-Way Paging at a time when both Congress and the Commission have substantially deregulated both two-way wireless services as well as the paging/messaging services. If the Commission's allocation of costs in fact is accurate, then it appears that the Commission is acting contrary to the wishes of Congress as well as its own policies to reach out and engage in increasing levels of regulation of CMRS.

Moreover, in no event can it fairly be concluded that the level of regulatory services has increased commensurate with the increase in regulatory fees to be collected from the CMRS Mobile Services and CMRS One-Way Paging categories. Section 9(b)(1)(A) of the Communications Act of 1934, as amended, indicates that the regulatory fee amounts to be collected are to take into account, *inter alia*, "the benefits provided to the payor of the fee by the Commission's activities."¹⁷ If the allocation of fees are not consistent with the regulatory activity costs validly applied to CMRS Mobile Services and CMRS One-Way Paging, then these services are subsidizing the true beneficiaries of the Commission's regulatory activities.¹⁸

¹⁷ 47 U.S.C. § 159(b)(1)(A).

¹⁸ In this regard, PCIA points out that a number of the Commission's regulatory activities subsequent to the enactment of the Telecommunications Act of 1996 have related to the

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C. The Commission Lacks Accountability to Those Entities Responsible for Funding Its Regulatory Activities

Finally, Congress has effectively shifted a large portion of the obligation for funding the activities of the Commission to the telecommunications industry. Prior to adoption of current Section 9 of the Communications Act of 1934, as amended, Congress had full authority to maintain complete oversight of the financial practices of the Commission. For fiscal year 1997, over 80 percent of the Commission's budget is to be collected from the telecommunications industry to replace funds previously appropriated by Congress from general tax revenues. Yet, the telecommunications industry has no tools for effective oversight of the Commission's collection, allocation, and expenditure of the funds in connection with regulatory fee activities. The telecommunications industry cannot call oversight hearings and demand that the Commission supply the information necessary to review and assess the proposals contained in the *Notice*.

PCIA is deeply concerned about the lack of accountability possessed by the Commission in connection with the administration of the regulatory fee program. This lack of accountability is reflected in the withholding of significant and essential information in the *Notice* necessary for effectively evaluating the Commission's past regulatory activity practices as well as its proposals for collecting regulatory fees for fiscal year 1997. It is critical that the

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responsibilities and obligations of local exchange carriers and competition in the local exchange marketplace. Yet, the Commission's existing regulatory fee schedule does not appear to take into account this activity nor to impose regulatory fee payment obligations based on the Commission's regulatory work in this area.

Commission take action to demonstrate that it is in fact accountable to those entities responsible for funding certain core Commission activities.

III. TWO-WAY PAGING SHOULD BE SUBJECT TO THE SAME REGULATORY FEE PAYMENTS AS ONE-WAY PAGING

The Commission has requested comment on a proposal to "establish a CMRS Messaging Service fee category to replace [the] CMRS One-Way Paging fee category."¹⁹ This category would include all narrowband services, including both one-way and two-way paging services. PCIA has previously supported this recommendation, and endorses its adoption in connection with the fiscal year 1997 regulatory fee schedule.

The CMRS Mobile Services category includes two-way broadband voice services, in addition to two-way paging. While two-way paging may share some characteristics with such services, it more closely resembles -- from an operational as well as regulatory perspective -- one-way paging services. For example, while all services currently included in the CMRS Mobile Services category involve two-way transmissions, two-way paging does not entail real time communications in the same way as cellular or broadband PCS. Two-way paging also does not represent the same potential substitute for local telephony as do cellular and broadband PCS simply because two-way paging meets different types of needs.

Even more significantly, however, the operational and technical characteristics of two-way paging are more closely aligned with those of one-way paging than those of cellular and broadband PCS. The Commission relied on this type of similarity in recommending in the

¹⁹ Notice, ¶ 39.

Notice that private microwave and commercial microwave systems should fall under the same category. Equitable application of the Commission's previously articulated standards warrants creating a single category for both one-way and two-way paging.

IV. CONCLUSION

The Commission's proposed fiscal year 1997 regulatory fee schedule imposes inappropriately high costs on CMRS Mobile Services and CMRS One-Way Paging payors as judged under the regulatory fees standards adopted by Congress, as well as the Congressional and Commission efforts to streamline and reduce the regulation of CMRS. Moreover, the Commission has failed to supply information and data necessary for interested parties like PCIA to evaluate the validity of the recommendations contained in the *Notice*. These significant issues must be addressed and satisfactorily resolved before the Commission can take final action on its proposals. In addition, the Commission should include two-way paging in the same category as one-way paging.

Respectfully submitted,

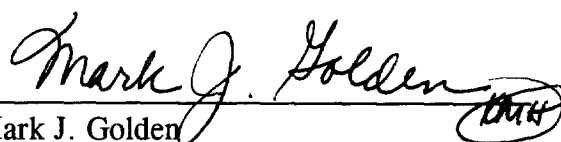
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